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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 440

ROBERT BORUM,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF WISCONSIN AND AMERICAN MOTORS CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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RESTATED QUESTIONS

Respondents believe that the following questions describe the issues to be decided by this Court more accurately than the question set forth in Appellant's Petition for a Writ of Certiorari (p. 2).

1. Whether the Appellant timely raised the issue of the repugnancy of the Wisconsin courts' construction of the Wisconsin Workmen's Compensation Act to Article XIV, Section 1 of the United States Constitution?

2. If the answer to question 1 is "yes" then did the Wisconsin Supreme Court determine whether or not the

Act was so repugnant in denying Appellant's motion for rehearing?

3. If the answer to question 2 is "yes" then did the Wisconsin Supreme Court deprive Appellant of life, liberty or property without due process of law by denying his motion for rehearing?

STATEMENT OF CASE

It is necessary to correct inaccuracy in the statement of Appellant pursuant to Rule 40(3) of the Revised Rules of this Court. The following sentences set forth in Appellant's Petition for Writ of Certiorari have no support in evidence:

> "* * * This condition was not fully ascertainable from a medical standpoint until after the initial hearing. The petitioner has undergone constant medical treatment since June 23, 1956 for 'traumatic neurosis' and has competent and expert medical testimony to offer as to the existence of the same which definitely relates it back to the injury of March 31, 1955. * * * "

Appellant's Petition states (p. 4) that when the first decision of the Wisconsin Supreme Court was rendered on January 2, 1959, "There was no formal finding of fact or written determination in this case at that time on petitioner's claim for 'traumatic neurosis'." It should be noted that the Wisconsin Supreme Court had been apprised of Appellant's claim based on a psychoneurotic factor prior to reaching that decision, since Appellant's brief filed with the Wisconsin Supreme Court, prior to the oral argument on that appeal, criticized the Industrial Commission of Wisconsin for failing to make a specific finding upon such factor. Reply briefs filed by

the Respondent, Industrial Commission of Wisconsin, and by the Respondent, American Motors Corporation, also discussed such issue. (Respondents recognize that the briefs filed by Appellant and Respondents with the Wisconsin Supreme Court have not been included in the record filed by the Appellant with this Court pursuant to Rule 21(1). But Respondents respectfully submit that if Appellant objects to Respondents' references to the briefs, Appellant is reminded that he could have cured any procedural difficulties in that regard by properly including such briefs in the record, along with the oral argument before the Wisconsin Supreme Court.) The failure of the Wisconsin Supreme Court to comment specifically upon that aspect of the claim for workmen's compensation in its written decision does not create the inference that the Court did not consider it.

ARGUMENT

I.

Appellant's Petition is Jurisdictionally Deficient because Federal Question was Untimely Raised.

A cursory reading of Appellant's Petition for a Writ of Certiorari to the Supreme Court of Wisconsin discloses that the Statement of Case fails to include any specifications of or reference to the stage in the proceedings before the Wisconsin Industrial Commission and the Wisconsin courts at which any federal question was timely and properly raised. The failure of the Petition to include such a showing makes it patently deficient under Rule 23(1)(f) of the Revised Rules of this Court, and should impel this Court to decline jurisdiction to review the judgment on Writ of Certiorari.

The omission from the Petition of any reference to the phase in the proceedings at which a federal question sought to be here reviewed was raised is undoubtedly not inadvertent. The first instance at which Appellant contended the long-standing interpretation of the Wisconsin Workmen's Compensation Act by the Wisconsin Supreme Court was violative of Article XIV, Section 1 of the United States Constitution, was in his Brief on Motion for Rehearing of the opinion of the Wisconsin Supreme Court reported at 13 Wis. 2d 570. The decision on the first appeal of Borum to the Wisconsin Supreme Court is reported at 6 Wis. 2d 168, 93 N.W. 2d 860. The raising of such a constitutional issue on a motion for rehearing of the second opinion rendered by the highest Court of the State in a given case is plainly untimely, under both the law of the United States (*American Surety Co. v. Baldwin* (1932) 287 U. S. 156; *Live Oak Water Users' Asso. v. Railroad Commission* (1926) 269 U. S. 354; *McGarrity v. Delaware River Bridge Commission* (1934) 292 U. S. 19, rehearing denied (1934) 292 U. S. 607; Annotation—79 L. ed. 1539, 67 L. ed. 557, 49 L. ed. 414) and the law of Wisconsin (*Green Bay Drop Forge Co. v. Industrial Commission* (1953) 265 Wis. 38, 60 N.W. 2d 409; *C. F. Trantow Co. v. Industrial Commission* (1952) 262 Wis. 586, 55 N.W. 2d 884; *Baker v. Leenhouts* (1950) 257 Wis. 584, 44 N.W. 2d 544, certiorari denied (1951) 341 U. S. 945).

Appellant has never claimed, either in the proceedings before the Wisconsin courts or in his petition to this Court, that the interpretation of the Wisconsin Workmen's Compensation Act by the Wisconsin courts as applied to his second application for compensation based on "traumatic neurosis" was at variance with any earlier interpretations by such courts, so as to prevent Appel-

lant from anticipating the constitutional issue until the motion for rehearing, *Cf. Brinkerhoff-Farris Trust & Sav. Co. v. Hill* (1930) 281 U. S. 673; *Missouri ex rel. Missouri Ins. Co. v. Gehner* (1930) 281 U. S. 313; *Great Northern R. Co. v. Sunburst Oil & Ref. Co.* (1932) 287 U. S. 358; *Herndon v. Georgia* (1935) 295 U. S. 441. Since the Wisconsin Supreme Court declined to grant Appellant's motion for rehearing, the constitutional questions so belatedly raised in Appellant's Brief in support of such motion were never expressly considered and argued before the Wisconsin courts, see and compare *Cumberland Coal Co. v. Board of Revision* (1931) 284 U.S. 23, and, therefore, should not be considered by this Court by writ of certiorari.

II.

Appellant's Petition is Further Deficient because Decision of Wisconsin Supreme Court can be Predicated upon Adequate State Grounds.

As stated in Point I. of this Argument, Appellant has untimely raised an issue of constitutionality of the Wisconsin law that an injured employee has one cause of action for compensation for all injury and disability sustained as a result thereof. While this untimeliness is not reflected by the Petition, which failed to make any reference to the stage of the proceedings at which any federal question was first raised, a review of the entire record in the Wisconsin Supreme Court would readily demonstrate the intempestivity of the federal issue. Equally absent from the Petition is any notation showing that the Wisconsin Supreme Court passed upon the federal question first presented in Appellant's brief in support of his motion for rehearing, in determining that the motion should be denied. It is fundamental under Rule

23(1)(f) of the Revised Rules of this Court, 28 U. S. C. §1257(3) and the reported cases that before the Court can review a state court decision, the Appellant must show (1) that the state court actually decided a federal question, and (2) that decision of the federal question was necessary to the state court's determination of the cause. Because of the myriad of decisions supporting this proposition, Respondents merely refer to their citation in Annotation—100 L. ed. 1200, 84 L. ed. 925.

The record before this Court does not demonstrate whether the Wisconsin Supreme Court determined the federal issue raised by the brief of the Appellant in support of his motion for rehearing. In denying such motion, the Wisconsin Supreme Court tersely stated that they were "* * * sufficiently advised of and concerning the motion of the said appellant for a rehearing * * *." (Appellant's Appendix E, p. 17). Respondents contended in their brief in opposition to Appellant's motion for rehearing that under Wisconsin law the Appellant, having sought to recover benefits under the Workmen's Compensation Act, could not attack its procedural provisions. Respondent cited *Derong v. Industrial Commission* (1932) 209 Wis. 88, 244 N.W. 591; *Thomson v. Public Service Commission* (1940) 236 Wis. 157, 294 N.W. 517; *Meyer v. Industrial Commission* (1961) 13 Wis. 2d 377, 108 N.W. 2d 556; and *Booth Fisheries Co. v. Industrial Commission* (1924) 185 Wis. 127, 200 N.W. 775. In the last-cited case this Court, in affirming the decision of the Wisconsin Supreme Court, held that a litigant who elected to accept the benefits and immunities of the Wisconsin Workmen's Compensation Act could not escape its burdens by asserting that it was unconstitutional, *Booth Fisheries Co. v. Industrial Commission* (1926) 271 U.S. 208.

As a consequence of these decisions it is obvious that the decision of the Wisconisn Supreme Court in denying Appellant's motion for rehearing may in all probability have rested upon the adequate basis of the Wisconsin rule barring an employee receiving benefits under the Workmen's Compensation Act from questioning the validity of its provisions and administration. To assume that the decision was predicated on a determination involving the constitutional issue is to indulge in mere speculation. It follows therefrom that this Court is without jurisdiction to review the decision of the Wisconsin Supreme Court. *E.g., Flournoy v. Wiener* (1944) 321 U. S. 253; *Herb v. Pitcairn* (1945) 324 U. S. 117; *Stembridge v. Georgia* (1952) 343 U. S. 541; *Durley v. Mayo* (1956) 351 U. S. 277.

CONCLUSION

For the reasons stated, the United States Supreme Court does not have jurisdiction to grant a writ of certiorari upon the petition. It is respectfully submitted that Appellant's petition should be denied.

Respectfully submitted,

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